

**1026 BAILMENT: NEGLIGENCE OF BAILEE MAY BE INFERRED**

[Give first paragraph of Wis JI-Civil 1005, Negligence: Defined.]

It is the duty of a person having the possession of the property of another to exercise ordinary care to protect the property from damage.

The burden of proof is upon the owner of the property, in this case (plaintiff), to show that the property of (plaintiff) which (defendant) had in (his) (her) possession was damaged as a result of the negligence of (defendant). This means that (plaintiff) must prove that (plaintiff)'s property was received by (defendant) in an undamaged condition and that, during the period of time that (defendant) had the property in (his) (her) care, (defendant) had exclusive possession of the property, and also that the damage to the property would not ordinarily occur without someone's negligence. Proof of these facts is sufficient for you to infer that (defendant) was negligent as to the care of (plaintiff)'s property. In other words, when such a showing is made, the law permits, but does not require, you to infer that (defendant)'s negligence was a cause of plaintiff's damage. You will not make this inference, of course, if (defendant) has offered an explanation, satisfactory to you, of how the damage occurred without (his) (her) fault.

[Burden of Proof, Wis JI-Civil 200]

**COMMENT**

This instruction and comment were approved in 1977. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. Editorial changes were made in 2004.

This instruction will not be used if the plaintiff is able to offer direct evidence of defendant's negligence.

The instruction proceeds on the theory that the elements indicated create a res ipsa case, rather than raise a presumption of defendant's negligence. The use of res ipsa in bailment cases was held proper in Arledge v. Scherer Freight Lines, Inc., 269 Wis. 142 68 N.W.2d 821 (1955), though on the facts of that case (fire occurring in bailee's premises) the res ipsa requirement of an accident of a kind which ordinarily does not occur in the absence of someone's negligence was held not satisfied.